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THE CHAMBERS OF TIMOTHY RAGGATT QC

# IMMIGRATION LAW UPDATE—

## New Matters can now be raised in appeals before the Upper Tribunal

**Kate Jones (2013)**

In Birch (Precariousness and mistake; new matters: Jamaica) [2020] UKUT 86 (IAC) the Upper Tribunal has determined that appellants are able to introduce "new matters" in appeals before the Upper Tribunal where this would not otherwise have been possible before the First-tier due to the Secretary of State withholding consent. Consequently, the prohibition on considering new matters in section 85 of the 2002 Act applies to proceedings in the First-tier Tribunal and does not apply to proceedings in the Upper Tribunal.

Background

The appellant, a national of Jamaica appealed against the decision of the First-tier Tribunal dismissing her appeal against the decision of the Secretary of State refusing her application for leave to remain on human rights grounds.

The appellant entered the United Kingdom in May 1999 with leave which after further applications and renewals expired on 30 September 2001. She remained in the United Kingdom without leave since then.

In 2007 or 2008 she was introduced to a person posing as an Immigration Officer and was persuaded to pay £3,000 to regularise her position and obtain a grant of leave. She gave the person her passport, which was returned with a stamp appearing to grant her indefinite leave to remain, and a letter confirming the grant. She was genuinely deceived; this was not challenged.

The fraud came to light in 2015 when the appellant applied for a driving licence and in the course of doing so it was ascertained that she had not in fact been

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**Daniel Wand (2016)**
**Jennifer Lanigan (2018)**

**Clerks:**

**Jason Roukin**
**Sandie Smith**

4 King's Bench Walk
Second Floor
Temple
London
EC4Y 7DL

Phone: 020-7822-7000
Fax: 0871-288-5693
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granted ILR. She was subsequently served with notice that she was liable to removal. She then applied for leave to remain on human rights grounds. Her application was refused on the basis that the appellant did not meet the requirements of the Immigration Rules in any category, and that her circumstances were not such as to give her a right to remain despite not meeting the requirements of the Rules.

At the time of the appeal the appellant had been continuously present in the UK for a number of years but not for 20 years such that she was eligible for a grant of leave under paragraph 276ADE of the Immigration Rules. Crucially, by the time the matter was heard in the Upper Tribunal on appeal from the First-tier Tribunal the appellant had been continuously resident in the UK for at least a period of 20 years. The fact of her continuous residence was not challenged by the Secretary of State.

The appeal

Prior to the hearing in the Upper Tribunal it was apparent that the appellant's representatives had attempted, without success, to persuade the Secretary of State that leave should now be granted on the basis of the appellant's 20 year continuous residence. At the hearing the Secretary of State's position was that the appellant's current position as a person who had spent twenty years in the United Kingdom was a "new matter", which the Upper Tribunal was not entitled to consider unless the Secretary of State gave permission to do so. The Secretary of State relied on section 85(4)-(6) of the Nationality, Immigration and Asylum Act 2002 which states:

*"(4) On an appeal under section 82(1) against a decision the Tribunal may consider any matter which it thinks relevant to the substance of the decision, including a matter arising after the date of the decision.*

*(5) But the Tribunal must not consider a new matter unless the Secretary of State has given the Tribunal consent to do so.*

*(6) A matter is a "new matter" if—*

- *(a) it constitutes a ground of appeal of a kind listed in section 84, and*
- *(b) the Secretary of State has not previously considered the matter in the context of—*
- *(i) the decision mentioned in section 82(1), or*
- *(ii) a statement made by the appellant under section 120."*

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London
EC4Y 7DL

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The Upper Tribunal agreed that the Secretary of States' argument would have purchase if the question had arisen before the First-tier Tribunal but went on to determine that while the matter remained before the Upper Tribunal the prohibition on the consideration of "a new matter" did not apply.

The reason given is that in section 81 of the 2002 Act the phrase "the Tribunal" is defined for the purpose of the ensuing Part (including section 85) as meaning the First-tier Tribunal and not the "superior court of record" of the Upper Tribunal.

It follows therefore that the restrictions imposed by section 85(5) do not apply where an appellant is before the Upper Tribunal, who may therefore introduce "new matters" without the consent of the Secretary of State.

The Tribunal was also considering in this appeal the "precarious leave" provisions where, as in this case, a person wrongly believed that they had indefinite leave to remain. On that issue the Tribunal determined that the observations about a person's misapprehension, found in paragraph [53] of Agyarko are, despite their context in a discussion of precariousness, capable of being applicable also to a person who has no leave.

The full judgment can be accessed on Bailii.

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**Immigration Detainees and Unlawful Detention**

**Tori Adams (2016)**

Currently, there are over 700 people detained under immigration powers pending removal from the United Kingdom. This is in no way unusual, or a significant number, in normal times whereby many (although not all) detainees are likely to be removed within a few weeks, if not days. However, the current climate is one filled with uncertainty due to the Covid-19 pandemic and restrictions in place as a result. Following the principles set out in the case of R v Governor of Durham Prison ex p. Hardial Singh [1984] 1 WLR 704, a person may only be detained for the purpose of deportation and only for a period that is reasonable. If it becomes apparent that it is no longer possible to effect deportation in a reasonable time period, detention is no longer lawful. With

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Temple
London
EC4Y 7DL

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serious limitations on international travel and a lack of clarity as to when these limitations are likely to be lifted, it begs the question of how continued detention can be justified.

On 25 March 2020, Detention Action brought a case in the High Court suggesting that continued detention could not be lawful in circumstances whereby people were not being deported and it was unclear as to when travel restrictions would be lifted. The High Court rejected the argument that all detention was unlawful and, whilst 350 detainees have subsequently been released, over 700 remain in detention. In some immigration removal centres there have been confirmed cases of Covid-19 and vulnerable individuals remain there. Some of these individuals may well pose a low risk to the public and be both low risk of re-offending and low risk of absconding. The duty is on the Home Office to provide reasons for keeping individuals detained having regularly reviewed each case on its own individual merits. However, with circumstances as uncertain as they are and so many people detained, it seems unrealistic to expect that the Home Office will conduct a review of each individual case and ensure that nobody falls through the gap.

So, are these people being detained unlawfully? On the basis that it is entirely unclear as to when deportations will be able to take place again as normal, and it is apparent that this is not going to happen within the next couple of weeks, it is difficult to see how continued detention in some, if not all, of the cases can be justified. Whilst some detainees may have committed grave crimes, be at high risk of re-offending and/or absconding and been detained for a short period of time, it is unlikely that these circumstances apply to all of those that have not yet been released. For a low risk detainee who has already been there for 3 months, the extension for an unforeseeable period is concerning and, arguably, unlawful.

Whilst it is unfortunate that the claim by Detention Action that the continued refusal to bail detainees was unlawful was not accepted by the High Court, hopefully it will at least have raised awareness that there is a problem. This may cause people to start reviewing and bringing cases on an individual basis rather than as a whole, which would require the courts to take each of those cases on their own facts. Further, individuals may start bringing cases for unlawful detention if the Home Office fails to properly review their detention or give adequate reasons as to why bail should not be given. Hopefully, due to the risk of such an influx of claims, the Home Office will start to review cases and release all but the highest risk individuals. If they do not do so, it is difficult to see how they will be able to

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Temple
London
EC4Y 7DL

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justify their decisions to keep people detained throughout the pandemic if they do receive an influx of unlawful detention claims as a result.

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## The Cessation of the Refugee Status in "Derivative" Claims under the Refugee Convention: A Case Law Update

**Daniel Wand (2016)**

*Secretary of State for the Home Department v KN (DRC) [2019] EWCA Civ 1665*

*Secretary of State for the Home Department v JS (Uganda) [2019] EWCA Civ 1970*

Introduction

The Court of Appeal has recently determined, in two cases in which judgments were handed down on consecutive days in October 2019, the issue of the cessation of refugee status (in other words, the Secretary of State's ability to revoke a person's refugee status and thereby deny them the protections afforded by the Refugee Convention 1951) for individuals with "derivative refugee status". These are persons who were granted refugee status in the United Kingdom, not on the basis of a determination by the Home Office that they had a well-founded fear of persecution in their home country but, instead, on the basis that a parent or relative upon who they were dependent had been granted substantive refugee status in the UK. These decisions were made pursuant to a Home Office family reunification policy.

KN was a national of the Democratic Republic of Congo. In 1989, his father fled the country in fear of persecution by the Mobutu regime and was granted asylum in the UK. In 1994, KN was granted Indefinite Leave to Remain in the UK and also recognised as a refugee. JS was a Ugandan citizen. In 2005, JS's mother was granted Indefinite Leave to Remain and refugee status in the UK on the basis of her well-founded fear of persecution in Uganda by reason of her imputed political opinions. In 2006, JS was granted Leave to Enter the UK for a family reunion and, in line with that, refugee status.

The broad question that the Court of Appeal had to confront in both of these cas-

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**Sandie Smith**

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Second Floor
Temple
London
EC4Y 7DL

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Fax: 0871-288-5693
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es was how the Secretary of State should determine whether such persons with "derivative refugee status" continued to satisfy the requirements, set out within Article 1A of the Refugee Convention, to qualify as refugees and thereby continue to benefit from the protections provided for within the Convention, including the right to *non-refoulement*. As a consequence, the Court had to decide on the proper interpretation of Article 1C(5) of the Refugee Convention, as reflected in paragraph 339A(v) of the Immigration Rules, and, more specifically, how the Home Office should approach the question of whether there was a relevant change in "*the circumstances in connection with which a person has been recognised as a refugee*"..

The Pre- KN (DRC) & JS (Uganda) Position

In 2017, the case of Secretary of State for the Home Department v Mosira [2017] EWCA Civ 407 came before the Court of Appeal. Mr Mosira, a Zimbabwean national, had been granted leave to remain and refugee status pursuant to the Home Office's family reunification policy; his mother had been granted refugee status earlier but not on the grounds of a well-founded fear of persecution in Zimbabwe but because there was a lack of medical facilities to treat HIV.

The Secretary of State subsequently revoked Mr Mosira's refugee status pursuant to Article 1C of the Refugee Convention and paragraph 339 of the Immigration Rules. This decision was appealed by Mr Mosira on the grounds that he would face a real risk of significant ill-treatment if returned to Zimbabwe. The Upper Tribunal held that the Secretary of State had not been entitled to revoke Mr Mosira's refugee status because the change in circumstances in Zimbabwe had nothing to do with the basis on which he had been granted refugee status, which was his relationship with his mother and the policy of family reunification. The Court of Appeal subsequently dismissed the Secretary of State's appeal against the decision; it held:

> *Mr Mosira was not granted refugee status by reason of the threat of ill-treatment by the authorities in Zimbabwe. Nor was his mother. Therefore the change in the threat posed by the authorities in Zimbabwe has no bearing upon 'the circumstances in connection with which [Mr Mosira] has been recognised as a refugee'. He was granted refugee status under the 2003 family reunion policy to join someone in the United Kingdom who had (and continues to have) refugee status here: those were the 'circumstances with which he [was] recognised as a refugee'. It cannot be said that the change in the threat posed by the authorities in Zimbabwe means that those 'circumstances' have ceased to exist.*

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The reasoning of the Court was that because the conditions in Zimbabwe was not the basis on which Mr Mosira was granted refugee status, any change in those conditions was not relevant to the question of whether there had been a change in "*the circumstances in connection with which a person has been recognised as a refugee*". The only relevant consideration according to the Court was the status of his relationship with his mother because that was the basis on which his refugee status had been granted.

The Approach of the Court of Appeal in KN (DRC): A Broader Interpretation is Required

The reasoning of the Court in Mosira was followed by the Upper Tribunal in KN: it held that:

> *23. As in the case of Mosira, the respondent was not granted refugee status by reason of the threat of ill-treatment by the authorities in the DRC. Although his father was granted refugee status on this basis, any change in the DRC still has no bearing on the circumstances in connection with which the respondent was recognised as a refugee.*
>
> *24. While there are differences between the position of Mr Mosira and the respondent, I do not consider that the reasoning of the Court of Appeal, when applied to the facts, can lead to a conclusion that the circumstances in which he came to be recognised as a refugee have ceased to exist. Although Mr Mosira was granted leave to enter the UK pursuant to a 2003 family reunion policy, and was granted refugee status under the terms of that policy, there is nothing of the evidence before me to indicate that the grant of entry clearance to the respondent in 1992 to enable him to join his parents in the UK was, in principle, any different ....*
>
> *25. Given that the political changes in the DRC have not altered the basis upon which the respondent was granted refugee status, I am not persuaded that the circumstances in connection with which he was recognised as a refugee have ceased to exist. I therefore find that the CRS decision did breach the UK's obligations under Article 1C(5) of the Refugee Convention.*

This was a narrow application of the applicable test which very clearly gave derivative status holders an incredibly high level of protection from having their refugee status revoked; their status could only be revoked if they ceased to be a relative of a person from whom they had derived their refugee status. Such persons therefore benefitted from a much higher level of protection than persons who had been granted refugee status on the basis of a well-founded fear of perse-

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Temple
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cution.

The Court of Appeal, isolating the case of Mosira as one that was limited to its individual facts, rejected a general narrow approach to the application of the test in Article 1C(5) of the Convention and paragraph 399A(v) of the Immigration Rules. It held that when assessing whether there had been a relevant change in "*the circumstances in connection with which a person has been recognised as a refugee*", for the purpose of determining whether a person's refugee status should be revoked, the "*circumstances in connection*" included the prevailing conditions in the individual's home country and, more specifically, whether these conditions prevented the person being returned. More specifically, the court stated that:

> [t]hose provisions in the Refugee Convention and Immigration Rules do not authorise the revocation of a refugee's status merely if the grounds on which the respondent was granted that status have changed but, rather, where "the circumstances in connection with which he has been recognised as a refugee have ceased to exist".

It went on to hold that KN's "*father's persecution by the regime in DRC, and well-founded fear of further prosecution were he to be returned to that country, were manifestly part of the circumstances in connection with which the respondent himself was recognised as a refugee*", and, furthermore, that:

> [a]s this court made clear in MM (Zimbabwe), given that the respondent has been granted refugee status, the onus of proving that the circumstances in connection with which he was recognised as refugee have ceased to exist lies on the Secretary of State. He must show that, if there were any circumstances which in 1994 would have justified the respondent fearing persecution in DRC, those circumstances have now ceased to exist and that there are no other circumstances which would now give rise to a fear of persecution for reasons covered by the Refugee Convention. As stated by Sales LJ in MM (Zimbabwe), the circumstances under consideration are likely to be a combination of the general political conditions in the individual's home country and some aspect of his personal characteristics. What is clear from that decision, and the Home Office policy document to which we were referred by the respondent's counsel, is that the focus of the investigation must be on the current circumstances of the individual and conditions in his home country.

**4 King's Bench Walk**
**Immigration Team**

**Edward Raw (1963)**
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The Approach in JS (Uganda): Derivative Status Holders are Not Refugees

The decision of the Court of the Appeal in SSHD v JS (Uganda) [2019] EWCA Civ 1970, which was handed down the day after KN (DRC), dealt derivative status holders another and more significant blow. First, it reached the same conclusion as the Court in KN, holding that the "*circumstances in connection*" included the prevailing conditions in their home country and were not limited to the specific basis on which refugee status had been granted; the Court held that:

> [t]he word "circumstances" is broad and general. It is apposite to cover both relationship and risk. The "circumstances" in connection with which JS was recognised as a refugee were clearly not simply that JS was his mother's son or that his mother had been granted refugee status; the "circumstances" necessarily included, the risks to which JS's mother was subject arising from her political affiliations in Uganda which led to her being recognised a refugee.

More fundamentally, however, the Court held that derivative status holders are not in fact refugees as defined by the Refugee Convention and, as a consequence, they cannot claim the protections afforded by the Convention including the fundamental protection of *non-refoulement.* It was stated that:

> the plain ordinary meaning of the words of Article 1A is that the status of a Refugee Convention "refugee" is only accorded to a person who themselves have a "well-founded fear of being persecuted", i.e. an individual or personal fear of persecution, not one derived from or dependent upon another person. This is clear both from the language of Article 1A itself and when read together with Article 1C(5). The reference in Article 1C (5) to "…the circumstances in connection which he has been recognised as a refugee…" is a direct reference to the "person" who falls within the definition of "refugee" in Article 1A, namely "… any person who … owing to [his] well-founded fear of persecution…", i.e. not someone else's fear of persecution.

The consequence of that decision was that the determination of the circumstances was irrelevant because there they did not have refugee status that could be revoked.

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**Immigration Team**

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**Conclusion**

The position established by these Judgments is not good news for persons holding derivative status as they make it far easier for such persons to have their status to remain in the UK revoked by the Secretary of State. These Judgments have substantial implications given the large number of people that have been granted refugee status and leave to remain in the UK on the derivative basis pursuant to the Home Office policy.

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## Deportation of foreign criminals who rely on Article 8: When is an EEA national a "qualifying partner"?

**Ben Haseldine (2014)**

This article seeks to address the issue of when an EEA national can be treated as a "qualifying partner" of a foreign criminal who is facing deportation where that foreign criminal relies on his right to respect for his private and family life under Article 8 of the ECHR.

It should be noted at the outset that in a number of cases, such as where the EEA national and foreign criminal are married, the Immigration (European Economic Area) Regulations 2016 will apply, with a self-contained scheme for the removal of family members from the UK. This article focusses rather on circumstances where the foreign criminal is not considered a 'family member' of the EEA national (e.g. where they are unmarried).

It is widely recognised that the Home Office will often seek to deport a foreign national who has a criminal history. If proof of this were needed, then one need look no further than section 117C of the Nationality, Immigration and Asylum Act 2002 ("the NIAA 2002") which states that '*The deportation of foreign criminals is in the public interest*' and '*The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.*'

In appealing against the Home Office's decision to deport them, many appellants who have an antecedent history will attempt to rely on their Article 8 right.

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**Immigration Team**

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**Sandie Smith**

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Temple
London
EC4Y 7DL

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Article 8(2) requires a balance to be struck by the state in interfering with a person's Article 8 right. In the UK, this balancing exercise is struck - when dealing with applications or appeals by foreign criminals - in section 117C of the NIAA 2002 which, so far as is relevant, is in the following terms:

> *(3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.*
>
> *(4) Exception 1 applies where –*
>
> *(a) C has been lawfully resident in the United Kingdom for most of C's life,*
>
> *(b) C is socially and culturally integrated in the United Kingdom, and*
>
> *(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.*
>
> *(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.*
>
> *(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.*

The focus of this article is Exception 2, and who may be considered a "qualifying partner".

Substantive guidance is given in subsection 117D(1) of the NIAA 2002 which states as follows:

> *"qualifying partner" means a partner who –*
>
> *(a) is a British citizen, or*
>
> *(b) who is settled in the United Kingdom (within the meaning of the Immigration Act 1971 – see section 33(2A) of that Act).*

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Clerks:

Jason Roukin
Sandie Smith

**"Qualifying Partner"**

An EEA national will be a "qualifying partner" for the purposes of Exception 2 if they are a British citizen or settled in the UK.

Pursuant to section 33(2A) of the Immigration Act 1971 '*references to a person being settled in the United Kingdom are references to his being ordinarily resident there without being subject under the immigration rules to any restriction on the period for which he may remain*'.

Assuming that the applicant's partner is an EEA national and not a British citizen, the crucial question, therefore, is when will an EEA national who lives in the UK not be subject to any restriction on the period for which they may remain.

Regulation 15(1) of the Immigration (European Economic Area) Regulations 2016 sets out the list of individuals who '*acquire the right to reside in the United Kingdom permanently*'. It includes (so far as is relevant for the purposes of this article):

> *(a) an EEA national who has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years; [and]*
>
> (c) *a worker or self-employed person who has ceased activity[.]*

(It should be noted that regulations 4 and 5 define who is a '*worker*' and a '*self-employed person*'.)

It is highly significant to note that the 2016 Regulations do not require the EEA national to register or otherwise make an application to formalise their status in order to acquire the right to reside in the UK permanently.

Support for this suggestion can be found in guidance published by the Home Office: '*Qualified persons do not need to apply for a document confirming a right of residence in the UK. If they wish to do so they may apply for a registration certificate*'.

Accordingly, it is suggested that provided the EEA national satisfies the requirement of the 2016 Regulations (e.g. continuous residence in the UK for a period

4 King's Bench Walk
Second Floor
Temple
London
EC4Y 7DL

Phone: 020-7822-7000
Fax: 0871-288-5693
www.4kbw.co.uk

of five years), then they should be treated as "settled" for the purposes of the Immigration Act 1971 and the NIAA 2002. This is regardless of whether the EEA national has formally been granted "settled status": the issuance of a document *certifying* permanent residence is a matter of evidence, and is independent of the *right* which arises upon satisfying the definition given in regulation 15(1) of the 2016 Regulations.

**Impact on a "qualifying child"**

**I**t is worth noting that the above approach to the issue of whether a person is "settled" may also be relevant in determining whether the child of a foreign criminal should be seen as being a "qualifying child" for the purposes of Exception 2.

Take the following example: a foreign criminal with a prior custodial sentence of three years ("C") has a partner who is an EEA national ("P"). P has been exercising her Treaty rights in the UK for a continuous period of, say, six years. On the above analysis, P is a "qualifying partner" for the purposes of C's Article 8 appeal, and therefore it is necessary for the Home Office or Tribunal to consider whether Exception 2 applies so as to outweigh the public interest in C's deportation.

Now imagine that C and P have a child together ("B") who is one year old. Is it possible to assert that B is a "qualifying child" for the purposes of Exception 2, and thereby putting a further obstacle in the way of C's deportation?

Section 117D(1) of the NIAA 2002 states:

> *"qualifying child" means a person who is under the age of 18 and who –*
> *(a) is a British citizen, or*
> *(b) has lived in the United Kingdom for a continuous period of seven years or more[.]*

B, by reason of being one year old, does not satisfy the continuous period of residency requirement; but can he be considered to be a British citizen?

Section 1 of the British Nationality Act 1981 provides as follows:

> *(1) A person born in the United Kingdom after commencement [...] shall be a British citizen if at the time of the birth his father or moth-*

**4 King's Bench Walk**
**Immigration Team**

**Edward Raw (1963)**
**Reginald Arkhurst (1984)**
**Kirsten Allen (1998)**
**Isaac Maka (1998)**
**Philippe Bonavero (2008)**
**James Batten (2013)**
**Kate Jones (2013)**
**Lucy Limbrey (2013)**
**Phil Anderson (2014)**
**Ben Haseldine (2014)**
**Jyoti Wood (2016)**
**Tori Adams (2016)**
**Daniel Wand (2016)**
**Jennifer Lanigan (2018)**

**Clerks:**

**Jason Roukin**
**Sandie Smith**

4 King's Bench Walk
Second Floor
Temple
London
EC4Y 7DL

Phone: 020-7822-7000
Fax: 0871-288-5693
www.4kbw.co.uk

*er is –*

*(a) a British citizen; or*

(b) *settled in the United Kingdom*

Section 50(2) of the 1981 Act assists with the interpretation and, unsurprisingly, establishes that '*references to a person being settled in the United Kingdom […] are references to his being ordinarily resident in the United Kingdom […] without being subject under the immigration laws to any restriction on the period for which he may remain.*'

Accordingly, if P is a "qualifying partner" because she is settled (that is, she has acquired the right to reside in the UK permanently), then B will be a British citizen, and so will be treated as a "qualifying child". This means that, when considering C's deportation, under Exception 2 it will be necessary to consider whether the effect of that deportation on both P and B would be '*unduly harsh'*.

(It should be noted that the outcome would be different if B had been born before P became "settled". If B is not born to a parent who is settled then he is not (without more) a British citizen and, therefore, not a "qualifying child".)

**Concluding Remarks**

It is hoped that this article will provide some useful guidance for solicitors acting for foreign criminals facing deportation who wish to rely on their Article 8 rights and where the foreign criminal does not otherwise fall within the scheme of the 2016 Regulations. It is important to bear in mind that the Home Office and Tribunals should pay special attention to the effect of deportation on "qualifying partners" and "qualifying children", and it may be notable that in that context it is not necessary for an EEA national to be formally "settled" for those criteria of people to be engaged.

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**Edward Raw (1963)**
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# IMMIGRATION LAW UPDATE

**AM (Zimbabwe) v Secretary of State for the Home Department [2020] UKSC 17**

**'One of the most controversial questions which the law of human rights can generate'**

**Jyoti Wood (2016)**

Last week (29th April) the Supreme Court handed down a momentous judgment in the matter of AM (Zimbabwe) unanimously holding that the Article 3 test allowing foreign citizens who have committed criminal offences to resist deportation on serious medical grounds should be more broadly drawn than previously, which had limited its application to a person very close to death where removal would involve "in effect, pulling a man off his deathbed". The Supreme Court has now held that the relevant test is whether removal would give rise to a real risk of a serious, rapid and irreversible decline in the person's state of health resulting in intense suffering, or to a substantial reduction in life expectancy. There is no longer a requirement that death be imminent to resist removal relying on Article 3 rights.

In reaching this decision all five Supreme Court Judges rejected the Court of Appeal's analysis which would have produced a more narrowly drawn test with much more limited practical application. The Supreme Court clearly understood the implications of its decision and the strong reaction it was likely to provoke:

> *"This appeal requires the court again to consider one of the most controversial questions which the law of human rights can generate.*
>
> *"It relates to the ability of the UK to deport a foreign citizen who, while lawfully resident here, has committed a string of serious crimes. The reaction of many British citizens is likely to be: 'We don't want this man here.' His response is: 'But I need to remain here.'."*

AM is HIV positive and his condition has been managed successfully for many years by antiretroviral drugs routinely available in the UK. He has lived in the UK for 20 years and was granted indefinite leave to remain in 2004. Between 2005 and 2009 AM was convicted of a number of serious offences, including possession of a firearm and ammunition for which he received 7 years imprisonment. As a result AM was made the subject of a deportation order which he initially challenged under Article 8, without success. Initially AM conceded that Article 3 conferred no rights he could rely upon, but following the judgment of the Grand Chamber of the European Court of Human Rights in *Paposhvili v Belgium(41738/10, GC)*, he received advice that the Grand Chamber had given an expanded interpretation of Article 3 which could form the basis of a challenge to the deportation order with much better prospects of success than an argument under Article 8.


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AM abandoned his reliance on Article 8, and formulated new grounds relying on Article 3, which the Court of Appeal dismissed, as they were bound to as domestic jurisprudence at the House of Lords/Supreme Court level had not yet incorporated the *Paposhvili* case in any domestic judgment. AM has now provided that opportunity, which the Supreme Court has unequivocally taken.

Previously authorities had restricted the application of Article 3 to cases where the deportee would die very quickly once removed to the receiving state, due to the absence of effective medical treatment, or at least access to it. While it is well established that the UK cannot deport a person if there is a 'real risk' of them being subjected to torture, inhuman or degrading treatment, the scope of Article 3 in medical cases has previously been limited to these 'deathbed' cases.

The Grand Chamber in the case of *Paposhvili* extended the scope of Article 3 to *"situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy".* So extremely serious consequences for the person's health but some way short of 'imminent death'.

AM's Article 3 challenge centered on his contention that, if removed to Zimbabwe, he would not have access to medication which prevents his HIV developing into AIDS, with the inevitable serious risk to his health and life expectancy. The Court of Appeal interpreted the change in the law brought about by *Paposhvili* in much more modest terms than the Supreme Court ultimately found last week, and so dismissed AM's appeal.

The Supreme Court criticised the Court of Appeal's analysis of *Paposhvili*, finding that *Paposhvili* had signaled a more radical expansion of Article 3 rights which AM might potentially rely upon to defeat the deportation order. The Supreme Court has made clear that each case will turn on its own particular facts and circumstances and allowed the appeal, remitting AM's case to the Upper Tribunal to enable contemporary evidence to be obtained to allow a properly focused evaluation of the risk to his health of a forced removal to Zimbabwe.

https://www.supremecourt.uk/cases/docs/uksc-2018-0048-judgment.pdf

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